

ATTORNEY GENERAL'S
CAPITAL CASE COMMISSION

Phoenix, Arizona
September 27, 2000
10:00 a.m.

TRANSCRIPT OF PROCEEDINGS

SOUTHWEST REPORTING
Court Reporters - Deposition Notaries
P.O. Box 31039
Phoenix, Arizona 85046-1039
(602) 788-5151

(ORIGINAL)

Reported by: Loretta A. Stanfield
Certified Court Reporter
Certificate #50513

Appearing as Chairman for the Attorney General's Capital Case Commission was Ms. Janet Napolitano.

Appearing as Members of the Attorney General's Capital Case Commission were Mr. Paul Ahler, Maricopa County Attorney's Office; Mr. Paul Babbitt, Coconino County Board of Supervisors; Dr. Peg Bortner, Ph.D., Center for Urban Inquiry College of Public Programs Arizona State University; Mr. James Bush, Fennemore Craig, (Chair, Governor's Mental Health Task Force); Mr. Jose Cardenas, Lewis and Roca, LLP; The Honorable Steven Conn, Mohave County Superior Court Judge; Senator Chris Cumiskey, Arizona State Senate; The Honorable Stanley G. Feldman, Arizona Supreme Court Justice; Mr. Jaime Gutierrez, Former Arizona State Senator; Mr. Charles Hastings, Yavapai County Attorney; Mr. Harold Higgins, Pima County Assistant Public Defender; Representative Marilyn Jarrett, Arizona House of Representatives; Mr. Christopher Johns, Maricopa County Deputy Public Defender Appeals Division; Ms. Nancy Jones, Pima County Assistant Public Defender Appeals Section; The Honorable Cindy Jorgenson, Pima County Superior Court Judge; Mr. Michael Kimerer, Kimerer & LaVelle; Mr. Charles Krull, Maricopa County

1
2 Deputy Public Defender Appeals Division; Mr. Thomas
3 LeClaire, Snell & Wilmer LLP; Ms. Gail Leland,
4 Director, Homicide Survivors; Representative John
5 Lored, Arizona House of Representatives; The Honorable
6 James Moeller, Former Arizona Supreme Court Justice;
7 Ms. Patricia Orozco, Yuma County Attorney; The
8 Honorable Michael Ryan, Arizona Court of Appeals Judge;
9 Senator Tom Smith, Arizona State Senate; Mr. Lee Stein,
10 Fennemore Craig; Mr. John Stookey, Osborn Maledon PA;
11 Mr. Steven Twist, Viad Corp, (Founder, Arizona Voice
12 for Crime Victims); Mr. Rick A. Unklesbay, Pima County
13 Attorney's Office; Mr. George Weisz, Executive
14 Assistant to the Governor; Mr. David R. Cole.

15 (Whereupon, the following proceeding
16 ensued.)
17
18
19
20
21
22
23
24
25

Phoenix, Arizona
September 27, 2000
10:00 a.m.

1
2
3
4 MS. NAPOLITANO: Let me begin by thanking you
5 all for coming and thanking all of you for being
6 willing to participate in this activity. We have some
7 other members of the commission, some of whom will be a
8 little delayed today and some of whom will catch up
9 later and you should all have received a list of all of
10 the other members of the commission so we all know what
11 it is.

12 This is a project that is going to be
13 easy, noncontroversial, and won't excite any passions
14 whatsoever. As we all know, all levity aside, we are
15 dealing with a serious issue, that is the fair
16 administration of the death penalty in Arizona. This
17 commission's charge is to analyse the operation of the
18 death penalty in Arizona, to identify any problems with
19 its fair administration and to make recommendations
20 with respect to curative measures that can be taken.
21 The commission, as you know, will be divided into three
22 subgroups; one to look at pre-trial matters, one to
23 look at the trial process itself, one to look at direct
24 appeal and postconviction relief matters. And we will
25 talk more about the committees in a moment.

1 Now, a little bit about the commission
2 and how it was designed and what its genesis was. In
3 Arizona we have imposed the death penalty in some 239
4 cases since the U.S. Supreme Court reinstituted the
5 death penalty. As we know, some other states have
6 experienced some difficulties with the death penalty,
7 most noticeably Illinois where the alleged systemic
8 problems were so serious the governor imposed a
9 moratorium. One of the things I want to ensure as the
10 chief legal officer of Arizona is that we do not become
11 an Illinois. That we do not become an Illinois. And
12 to do that requires that we take a fair and objective
13 look at the universe of cases with which we are
14 dealing, that we analyze objective data arising from
15 those cases, and that we make our best judgments
16 arising from that data.

17 This commission is diverse. This
18 commission is very diverse and intentionally so. We
19 have prosecutors and we have lay people. We have
20 judges. We have defense attorneys. All of you bring
21 to this room particular experiences, life experiences
22 and legal experiences that I think will be of value to
23 our group. We know that a lot of people wanted to be
24 on this commission who could not be on just in terms of
25 management, so we made the best judgments we could as

1 to how to get a fairly representative group of views
2 here today. And we are going to be taking comments
3 from anyone who wants to give input into the
4 commission. Anyone who wants to submit written
5 comments during the course of our meetings can. We
6 will get them to the appropriate subcommittee so they
7 can be included. So our thinking is and our goal is to
8 be as inclusionary as possible within a limitation of
9 having to be a group that is manageable that we can
10 bring together.

11 And let me say a little bit about some of
12 the things that all of you can anticipate. I have
13 gotten a little bit over the summer so you will see
14 that this is a subject that incites high passions.
15 There are those who believe we should never have a
16 death penalty. There are those who believe we don't
17 use it enough.

18 Let me say at the outset whether or not
19 we have a death penalty is not the function of this
20 commission to resolve. That is the law of Arizona.
21 The function of this commission is to evaluate how that
22 penalty is administered and imposed throughout our
23 state from the northern counties to the southern
24 counties, to look at issues to make sure that
25 irrelevant characteristics such as, race, ethnicity are

1 not playing a part in the administration of the death
2 penalty and to look at our statute in terms of its
3 procedures implementation to see how it's really
4 working.

5 We want to come out of this commission
6 and I want to come out of it with a sense that we have
7 done as thorough and objective an evaluation as can be,
8 with a sense that we have heard diverse views, and with
9 a sense that we can instill in Arizonans a confidence
10 that their criminal justice system is one that is
11 strong enough to be able to look introspectively at
12 itself and that we are willing to do that. So those
13 are our functions.

14 Now, some of you are in a sense being
15 held to be representatives for others. Some folks are
16 here from prosecutorial offices. Of course, we couldn't
17 have all the 15 county attorneys represented, but we
18 have a good representation from the county attorneys.
19 The criminal defense lawyers who are here, can't be all
20 the criminal defense lawyers, but are a fair
21 cross-section of the criminal defense bar. Although, I
22 guess some of your fellow criminal defense lawyers were
23 kind of grouchy about that this morning that they
24 weren't at the table. But they are more than welcome
25 to provide input and we welcome that. We don't have

1 every judge here. We don't have every court here. We
2 don't have every citizens group here, but this group,
3 in my judgment, represents the best cross-section we
4 can get on this very important topic.

5 Let me talk about what we have been doing
6 since the idea for the commission evolved or arose. We
7 thought about what are some of the questions that we
8 need to ask ourselves, that we need to ask ourselves.
9 Do we discriminate in the administration of the death
10 penalty in this state? Is our system susceptible to
11 corruption? Are we providing competent counsel for
12 capital defendants? Are claims of innocence being
13 adequately reviewed? Are we reducing unnecessary delay
14 in the administration of the death penalty?

15 Those are things that merit and can have,
16 in my view, a factually based response from this
17 commission. There are numerous other questions, but
18 those give you a flavor of at least what we are
19 thinking about in the Attorney General's Office.

20 We will be beginning with an exhaustive
21 empirical study of the death penalty in this case, in
22 this state. And that work, of course, takes a lot of
23 time do. So I went to Arizona State University and
24 their folks have graciously donated time and expertise
25 to do the empirical work. I wanted to particularly

1 thank DeAnn Schneider for all her support in the
2 College of Public Programs at Arizona State, and
3 Dr. Peg Bortner who has actually been carrying the
4 labor of war, and you will hear more from Dr. Bortner
5 in a moment.

6 They have been working since early to mid
7 July accumulating the death penalty files and other
8 data regarding the 239 cases in which capital
9 punishment has been adjudged since 1974. We have made
10 all the files open for review. As you might imagine,
11 some of the older ones in particular have become spread
12 out, documents have become locked in boxes in basements
13 far away, as far as I can tell. And so, as Dr. Bortner
14 will explain, we are still finding some of the final
15 documents. But we are getting there and it's taken an
16 immense effort from a lot of people, both at ASU, but
17 also in the Attorney General's Office to make sure that
18 we get there.

19 A word about the subcommittees. We
20 solicited your druthers and what subcommittees you
21 would like to be on and I think that we managed to put
22 everybody on at least their second choice and I think
23 most people got their first choice. We tried to make
24 the subcommittees as representative as possible so we
25 did not have one that was dominated by defense lawyers

1 or one dominated by prosecutors and the like. So we
2 tried to make sure the subcommittees were fairly
3 representative of the commission as a whole.

4 And obviously the bulk of the work of
5 this commission will be done through the subcommittees
6 reporting back. Anyone is welcome to attend any
7 meeting of any subcommittee. In other words, just
8 because you are the pre-trial subcommittee does not
9 mean you cannot also attend a trial subcommittee
10 meeting. It depends on your time. Depends on how many
11 meetings you can put into your schedule, but they are
12 all open to everybody. The recommendations of the
13 subcommittees will be circulated to the full commission
14 for any input you want to have so that -- don't feel
15 that because you are in one subcommittee you cannot
16 have input on others.

17 Some of you have sent in comments that we
18 received after really an agenda was prepared and so
19 forth. We will make those comments available to the
20 subcommittee chairs. John Stookey, for example, sent a
21 very thoughtful letter with a number of suggestions.
22 We will make those available to the subcommittee
23 chairs. And he pointed out, I think an important
24 point, there are some issues that are overarcng, they
25 will cross into several different categories; the

1 appointment of defense counsel, for example, is an
2 issue that is an overarcng issue. So we don't want
3 to, by proceeding through subcommittees, lose sight
4 that we have some issues that are going to be common
5 threads through it all. But I think this was the best
6 way for us to organize and get the job done.

7 A little bit about timing. We have
8 scheduled four meetings before the end of the calendar
9 year. Our hope is that we can get the bulk of our work
10 done by then, but timing does not control the
11 overarcng need for integrity in this project. If we
12 need to spend a little more time, we will. But we need
13 to make sure that we are not in ourselves creating
14 unnecessary delay. So my job as the self-appointed
15 chair of this commission is to push us along and make
16 sure that we don't let this linger for an unduly long
17 period of time, while at the same time let me emphasize
18 we want to make sure that you all leave and I leave
19 this commission with a sense that we did the best job
20 that we could in making sure that we had a fair and
21 objective evaluation of the death penalty
22 administration in our state.

23 With that, I'm going to close temporarily
24 and introduce Paul McMurdy who is chief of the criminal
25 appeals section at the Attorney General's Office. I've

1 asked Paul to give us a 10- to 15-minute overview of
2 the death penalty process from a legal procedures
3 standpoint and I did this for a couple reasons: One is
4 we have people on the commission who are lay people who
5 may not know all the various procedures that are
6 followed. Secondly, even those of you who are here as
7 lawyers may only know part of it and so we want to put
8 the whole thing together for you.

9 And Paul, please take us forward.

10 MR. MCMURDY: Sure. Janet asked me to tell
11 you everything you wanted to know about the death
12 penalty in 10 or 15 minutes. No problem. I can do
13 that. John Stookey will then get 15 minutes of
14 rebuttal.

15 Since I'm a frustrated history teacher, I
16 wanted to start with a history lesson and tell you why
17 we are here today as far as a legal procedure aspect.
18 And we are going to start with -- we are going to start
19 with an old case that no one has ever heard about and
20 that is McGover versus California, and I only bring
21 this up to let you know how we've come full circle. In
22 McGover versus California, the United States Supreme
23 Court said there was no reason under the 8th Amendment
24 to tell the jurors anything. Basically a jury serving
25 the death penalty could decide and consider whatever

1 they wanted and impose the punishment. And several
2 years later in Furman versus Georgia they did a 180 and
3 struck down all death penalty statutes in the United
4 States, federal and state, because they said there was
5 no rational basis to explain why some people got the
6 death penalty and others didn't.

7 Now, that left the states in a very --
8 there was no consensus in the courts on how to
9 construct the death penalty scheme. So the states went
10 out and did various methods in constructing death
11 penalty statutes, and there were four basic methods;
12 the Georgia model, the Texas model, the New York model,
13 and the Florida model. And the Florida model was that
14 which had been by the model Penal Code. Arizona
15 passed, in essence, the same procedure as that which
16 was adopted in Florida. In a series of cases started
17 in 1976, the U.S. Supreme Court affirmed three of the
18 four models, only striking down the North Carolina
19 model. The North Carolina model was the model that
20 said once you have met certain minimum requirements the
21 death penalty was mandatory and they struck that down.

22 And the only other -- well, the other two
23 cases I want to talk to you about, the U.S. Supreme
24 Court in Locket versus Ohio, they struck down a
25 provision that said you could not limit the type of

1 mitigation that a defendant was presenting. So that in
2 essence you had to funnel the aggravation or funnel the
3 jury's discretion or the sentencing bar's discretion to
4 a certain point and then you had to allow the
5 sentencing body to consider all mitigation in imposing
6 the death penalty.

7 In Arizona we passed our statute in 1973.
8 We originally had the same procedures as Ohio had
9 struck down in Lockett versus Ohio. So in 1978, our
10 Supreme Court struck down all of the death sentences
11 that had been imposed under the new procedure and there
12 were resentencing in all of those cases. The 9th
13 Circuit struck down our death penalty statute in 1988,
14 claiming that it violated federal provisions of the
15 U.S. Constitution. The U.S. Supreme Court reversed
16 that decision in 1990 in Ralton versus Arizona,
17 affirming Arizona's death penalty procedure.

18 So what is that procedure? Most of you
19 or a lot of you that are familiar with this understand
20 how it works. Once someone has been sentenced -- or
21 once someone has been convicted of first-degree murder,
22 there are 10 aggravating factors. One of those
23 aggravating factors has to exist to make the person
24 death eligible. Once the State has proved by -- beyond
25 a reasonable doubt that one of the 10 aggravating

1 factors exists, the burden shifts to the defendant to
2 prove the mitigation by a preponderance of the
3 evidence. If there is insufficient mitigation to
4 warrant leniency, the death penalty is imposed. At
5 that point in time there is an automatic appeal to the
6 Arizona Supreme Court, where the Arizona Supreme Court
7 is considering other trial issues also has the
8 statutory obligation to independently review the
9 aggravation and mitigation to determine if the sentence
10 is appropriate.

11 Other unique features to Arizona, 30 days
12 after the arraignment, the county attorneys or the
13 Attorney General or whoever is prosecuting the case has
14 to give notice of the intent to seek the death penalty.
15 Once the notice is filed, this kicks in certain
16 provisions under the Arizona Rule of Criminal Procedure
17 that require the appointment of two attorneys in each
18 case, obviously if the defendant is indigent, and has
19 certain standards of counsel for the appointment of
20 these attorneys. And those are listed in your
21 materials that we sent out to you and I'm not going to
22 go through them.

23 At the post-conviction relief stage,
24 after -- if the Arizona Supreme Court as affirmed the
25 death sentence, then again these appointment of counsel

standards are applied in the appointment of post-conviction counsel.

Now, the process itself. Why does it take so long to have a death penalty carried out? We provided in your materials a chart with boxes and they were colored and -- after the trial and direct appeal, there is a petition for post-conviction relief that goes back to the trial court. In the trial court that's where allegations of ineffective assistance of counsel are made. The trial court conducts a hearing, determines whether or not effective assistance of counsel was rendered, if it's determined that, in fact, it was effective, she was effective, relief is denied and it again goes back to the Arizona Supreme Court on a petition for review. If they deny the petition for review, a warrant issues and it goes to the federal courts, the federal district court. The federal district court can then consider all of the issues that have been presented in state court to determine if there was a violation of federal constitution. Once the district court makes that determination, there is an appeal to the 9th Circuit Court of Appeals. If the 9th Circuit Court of Appeals confirms, then the State asks for a warrant of execution and the person is then set for what would be a legitimate expectation of

1 execution.

2 There are a couple of other unique
3 features in Arizona. We have a statute that prohibits
4 the -- a mechanism for determining whether or not the
5 inmate is competent to be executed. The U.S. Supreme
6 Court has determined that it is unconstitutional to
7 execute those people that don't understand they have
8 been convicted for first-degree murder and that their
9 punishment is death, so we have a statutory system in
10 place that allows for that issue to be raised. And
11 also the board of executive clemency can issue a
12 reprieve or a recommendation for a reprieve or
13 commutation that would then authorize the governor to
14 act on such. That is the basic general overview of the
15 process.

16 According to Terry Stewart and the
17 Department of Corrections, today in Arizona we have
18 over 1,700 inmates that are being housed in the Arizona
19 State correctional system for convictions of homicide
20 in some form. There are 120 inmates on death row. So
21 of 1,700 only 120 actually have a death sentence. The
22 State's position is clear that the reason why these 120
23 have been selected is because they fit the statutory
24 definition of death eligibility because they have
25 aggravating factors and insufficient mitigation to

1 warrant leniency.

2 And I was also told that I was supposed
3 to open it up to the commission to answer any
4 questions.

5 JUSTICE MOELLER: The 1,700 that are in prison
6 for homicide, are they first-degree murderers?

7 MR. MCMURDY: They are not all first-degree
8 murderers. That's all homicide.

9 JUSTICE MOELLER: All homicide. All the way
10 down to manslaughter? So you have a lot of those who
11 would be ineligible for the death penalty to start
12 with?

13 MR. MCMURDY: Correct. And I believe, Terry,
14 you can correct me, I think it's like half and half.
15 Half of those are first degree and the other half --

16 MR. STEWART: If I remember right, Paul, I
17 believe that's correct.

18 MR. AHLER: Paul, what's the average length of
19 time from charging to execution of those inmates that
20 have actually been executed in the state?

21 MR. MCMURDY: Very, very long time. We --
22 from the time of sentence to execution is approaching
23 20 years on average of the 21 inmates that have been
24 executed under this system.

25 SENATOR CUMMISKEY: Mr. McMurdy, I'm trying to

1 get a better sense of this universe. You said 1,700,
2 of which Justice Moeller indicated probably half of
3 those are first degree, so if you have got somewhere in
4 the neighborhood of 700, 800 that are first degree,
5 only 120 are meeting the criteria that you indicated,
6 then where is the drop off? Is there mitigation on
7 those other cases or -- generally speaking?

8 MR. MCMURDY: Lack of -- I mean sufficient
9 mitigation, no aggravation, whatever -- I mean there's
10 a wide range of variables that would play into why
11 those people were not executed.

12 SENATOR CUMMISKEY: But they would be eligible
13 under the definition set forth in the statute?

14 MR. MCMURDY: I depends. I hate to play a
15 lawyer here, but that depends on how you define the
16 definition.

17 MS. NAPOLITANO: You do sound remarkedly like
18 a lawyer.

19 MR. TWIST: Though isn't.

20 MR. MCMURDY: I didn't say that. If your
21 definition is do all of these cases have an aggravating
22 circumstance so they are going to be eligible for the
23 death penalty, I don't know. If you are saying were
24 they death eligible in the sense that the State
25 convicted them of first-degree murder proved an

1 aggravating factor, but for -- so that would make them
2 eligible and there were other reasons why they didn't
3 get sufficient mitigation, again, we are hoping that
4 some of this data will come forward from what
5 Dr. Bortner is doing.

6 MR. TWIST: Paul, I would like to follow up on
7 Paul Ahler's question. Within that complete span of
8 yours that you just reported, have you had a chance to
9 break down how many months or years it takes for each
10 of the steps that you have described in the process?
11 What the time -- the average time period is to resolve
12 a direct appeal? What the average time is to resolve a
13 Rule 32? Do you have that level of detail on the
14 amount of time?

15 MR. MCMURDY: We don't. And we kind of have a
16 general feel for it. So I don't want to get into what
17 my general feel is because Dr. Bortner's actual numbers
18 are going to be presented to you.

19 MR. TWIST: You say you don't have it, but is
20 that something that Dr. Bortner is going to report to
21 us?

22 MR. MCMURDY: Yes, that was one of the things
23 that we were addressing is actually how long -- where
24 in the process is it taking time. And I'm not going to
25 stand up and give you this is my general feel, because

1 we are going to have actual numbers.

2 MS. NAPOLITANO: Any other questions?

3 MR. BUSH: I think I understood you to say
4 that if a person's mental condition is such that they
5 don't understand that they have been convicted, that
6 then they will not be executed. Did you say that?

7 MR. MCMURDY: Correct.

8 MR. BUSH: My question is I believe, I'm not
9 certain, that it may be possible psychiatrically for a
10 person to understand that they've been convicted but
11 still insane. In that case is that person going to be
12 executed?

13 MR. MCMURDY: We are talking about the legal
14 definition of what would prohibit someone from being
15 executed. So the U.S. Supreme Court has said that was
16 the bare minimum. You can have a mental illness, but
17 as long as you -- that inmate meets the bare minimum,
18 that person is eligible for execution. There's nothing
19 that would prohibit a state from setting a higher
20 standard, as some states, in fact, have. But in
21 Arizona that is the standard that now exists in our
22 statute.

23 MR. BUSH: Then I still don't understand. A
24 person may psychiatrically understand that they have
25 been convicted of this crime, but they still are

1 determined by a psychiatrist to be insane. So are they
2 going to be executed?

3 MR. MCMURDY: They would be eligible for
4 execution.

5 MR. LOREDO: In connection with your
6 procedures on the death penalty, Paul, you noted of the
7 procedures that show petition for United States Supreme
8 Court. How often is that implemented in the death
9 penalty cases?

10 MR. MCMURDY: Where petitions are filed?

11 MR. LOREDO: Yes. In fact, at those upper
12 levels.

13 MR. MCMURDY: Almost always. There are very
14 few cases that don't. And primarily those cases would
15 be the volunteers, the people that have indicated that
16 they no longer want to go forward with an appeal.

17 SENATOR CUMMISKEY: I think maybe a question
18 or maybe a comment that goes along with the competency
19 issue, how young may a person be in Arizona before they
20 can be executed?

21 MR. MCMURDY: There is no statutory
22 limitation. The U.S. Supreme Court has indicated that
23 15 and below would violate the U.S. Constitution, so it
24 would have to be 16 or above.

25 SENATOR CUMMISKEY: So in other words, a

1 person between the ages of 15 and 18 could commit a
2 crime as a juvenile and be executed later down the line
3 when they become an adult for a crime they committed
4 while they were under --

5 MR. MCMURDY: The age alone wouldn't prohibit
6 them from being executed.

7 SENATOR CUMMISKEY: Under that issue, just off
8 the top of my head, there is at least one person on
9 death row in Arizona whose sentence has been affirmed
10 who was 16 at the commission of the crime and there may
11 be another who was 17 at the time of the commission and
12 there are several others below the age of 21.

13 MS. NAPOLITANO: Thank you. Some of the
14 questions raised issues about how long, average
15 numbers, and so forth, and I'd like to introduce
16 Dr. Peg Bortner for the Center for Urban Inquiry of the
17 College of Public Programs at Arizona State who has
18 spent her summer going through files and reading
19 microfilm and so forth, and Dr. Bortner, would you lay
20 out where we are and what you are doing and how it is
21 going to be organized.

22 DR. BORTNER: Thank you. I have thought of
23 those essays, how I spent my summer, along with about
24 25 other people. It's an honor to serve in this
25 capacity and facilitating in research for this and for

1 the members of our society including here in Arizona.
2 It is not true that there are large signs saying "pro
3 bono" with arrows that point toward our center and my
4 office. But I suspect that word of mouth is better
5 than the internet on this.

6 I welcome this opportunity to head up
7 this research effort because of course the importance
8 of this issue to all of us. And also because, and I
9 think this is not unprecedented, that Arizona has an
10 opportunity to create a model for very informed,
11 deliberate, and conscientious consideration and
12 reconsideration of the upper policy. The work of the
13 data and research committee has been undertaken in that
14 very spirit.

15 We have sought not to be excluding any
16 notions or any vision, but to be as inclusive as
17 possible. In particular to locate sources of
18 information that will be responsive and potentially
19 responsive to your concerns as members of the
20 commission and to have a process in which we listen to
21 the experience, the understanding, and the concerns of
22 all commission members. In that spirit we will attempt
23 as a research committee to cover all of the meetings of
24 all of the subcommittees in order to piece together
25 better our understanding of what research is needed in

1 Arizona. We will continue to do that listening
2 throughout the process. We are concerned that the
3 research process reflect as much as possible the
4 complexity and the scope of the many issues involved.

5 In that spirit I would like very much to
6 thank the members of the research committee who have
7 labored throughout the summer. These are individuals
8 what were asked to serve on this committee in order to
9 make sure that this wasn't an exercise in running the
10 numbers. In this case just getting the numbers is an
11 unbelievable task, but running them is often what
12 researchers -- we just run those numbers. Basically
13 our desire was to make sure that the research endeavor
14 was guided by and made sensitive by individuals within
15 the research community, within the criminal justice
16 community and sensitized to the diverse and very very
17 complex issues.

18 May I express my deep appreciation to
19 Judge Michael Ryan from the Arizona District Appeals
20 Court. We have offered him a job later on as a
21 researcher. He's had yet -- he is holding out. He has
22 not consented. Dr. John Stookey of Osborn Maledon,
23 representing the defense community. Mr. Rick Unklesbay
24 from Pima County -- he's a Pima County Deputy Attorney.
25 He has represented the prosectorial community on our

1 commission. We must also express enormous appreciation
2 to the Attorney General's staff.

3 The data that I am going to speak about
4 are not data that are available under computerized
5 tapes. They are not available on disk. They are data
6 that have been garnered from cases, some of which are
7 enormously elusive from the Attorney General's staff
8 trying to track them down. This has been an enormous
9 amount of work and they have been good colleagues in
10 every sense of the word. I must also pause to thank
11 the researchers at Urban Inquiry who have been
12 dedicated to this pursuit.

13 Basically, what we are trying to do is
14 avoid social policy based on incomplete knowledge or
15 incomplete understanding. We'd like to provide an
16 assessment of what data, what information are needed to
17 guide decision-making, and you have already alluded to
18 several of those pieces. We have a commitment to
19 listening to your concerns, to looking for alternative
20 data sources, to creating and maintaining databases to
21 guide social policy. We are data aware. We are not
22 data crazy. We fully realize that the commission must
23 and should engage in the most encompassing big picture
24 question for which systematic information is not
25 readily available. But that process is a long-term

1 commitment and we have made it.

2 Our colleague staff member Diane has
3 probably distributed to you a sheet. This is a summary
4 of the endeavors that we are undertaking. Data Set I,
5 this is the first endeavor that we are engaged in.
6 This is the review of capital cases. This is a brief
7 summary. Again, members of the committee, I would be
8 very delighted to speak with you in detail, but I'm
9 trying to do this in a concise manner.

10 Data Set Number I is about the 226
11 individuals who have been sentenced to death and had
12 their convictions and sentences affirmed by the Arizona
13 Supreme Court between 1974 and July 1st of this year.
14 July 1st is a cutoff that the research committee
15 decided on as a point at which we must stop and say
16 these are the -- this is the end of the sample for this
17 year.

18 What are we looking at in this particular
19 sample? There are three profiles that emerge and that
20 we are trying to gather to present to you. The first
21 is a profile of defendants, including such issues as
22 age at the time of the crime, sex, first language,
23 race, ethnicity, citizenship status, occupation and
24 employment status, education level, Mr. Bush, mental
25 health status, criminal defense history, and

1 co-defendants. There is a more shadowy presence in
2 these records that come to us from the Attorney
3 General's Office and that is the presence of victim.
4 This is an important example where it is extremely
5 necessary for us to look for other sources of data in
6 terms of being more robust in our analysis.

7 In these case files the information about
8 victims, and some of it is incomplete, but the
9 information tells us about race, ethnicity of victims,
10 age at time of crime, sex, and relationship to the
11 defendant, which is intriguing and I think you will
12 find it a very interesting variable. On the victims,
13 let me say again that we are very aware that additional
14 sources of information are needed as quickly as
15 possible and on the long-term basis. We would like to
16 express our appreciation to the victim witness programs
17 within the county offices as well as the Attorney
18 General's Office and we are pursuing the data that they
19 have available. This, of course, is a time-consuming
20 effort.

21 The third profile that emerges is one
22 that some of you are most interested in and this is a
23 profile of the death penalty process itself. There are
24 some regional differences that we will look at. The
25 very simple question of county. Is the question of

1 which county in which a case is prosecuted, does that
2 have a significant bearing on the outcome of a case?
3 Defense attorney, what type of defense attorney?
4 Public defender? Contract? Privately obtained?
5 Disposition of co-defendant cases. Then we have a long
6 series of issues that we are addressing that have to do
7 with the time intervals that are involved. And this,
8 again, addresses some of the concerns that have already
9 been expressed this morning. This is the fundamental
10 question of how long. How long do steps in the process
11 take? We can calculate that. We list all of the dates
12 and have our computer calculate average length as well
13 as range of length. We will be able to give you those
14 data but it will be up to the commission to give due
15 deliberation to the significance of those time
16 intervals. We have resisted using the word "delayed"
17 because in our interactions with members of the diverse
18 communities represented on this commission, some parts
19 of the process may be viewed as unjustly slow, others
20 may be viewed as unjustly speeded up. It will be
21 important to acknowledge and weigh the perspective of
22 all of those involved, including the larger society's
23 desire to define and to do justice. We can calculate,
24 but this committee must deliberate.

25 The profile to the process also focuses

1 on arguments raised during this long process.

2 Beginning with aggravation and mitigation at sentencing
3 and following through the issues that are raised during
4 the appeals. I am in absolute awe and somewhat
5 disbelief that Paul was able to present a chart like
6 this about the process. At the beginning of this, our
7 colleagues from the Attorney General's Office gave the
8 researchers a chart. I was tempted to bring it this
9 morning, but not given to being a drama queen, I
10 thought that I would resist. It goes from that side to
11 that side and would wrap around a little bit, the
12 complete death penalty process. So maybe I should
13 bring it to subcommittees if you would be interested in
14 looking at it.

15 Some of you have intimate knowledge of
16 this process. What we are trying to do with this Data
17 Set Number I is to point out what are the issues that
18 are brought forward, what are the arguments that are
19 expressed? This is one area where we as a research
20 team, the researchers at the University, we are very
21 convinced that in order for us to have the best
22 information upon which to base our public policy we
23 really need to look at all of the cases that were
24 affirmed, where arguments were placed that were not
25 accepted and did not result in a reversal. This is an

1 enormous task. We have, for the purposes of this
2 commission, agreed that we will limit the cases on
3 appeal that we will look at in depth to those cases
4 that resulted in a reverse or a remand. In other
5 words, what the national study has called reversible
6 error. In what cases, which arguments succeeded in a
7 judicial decision that more decision-making must take
8 place in terms of this?

9 Again, we are limited by our time and our
10 resources, but we think that these preliminary data
11 will at least provide something for the commission to
12 scrutinize. We need to scrutinize the reversals and
13 decipher their significance for the system as it
14 currently works and for the death penalty.

15 Some of us on the commission will review
16 those reversals as evidence of gross failures of the
17 system. Others of us will give those reversals as a
18 denial of victims survivors who sought death. Others
19 of us will view those reversals as signs of success
20 that the process of checks and balances does indeed
21 work and that unjust executions were avoided.

22 It occurred to me that I must tell you in
23 good conscience the project status on each of these
24 three issues. It would be unscrupulous of us as a
25 committee to say we will report these data today. We

1 are hoping -- we have hoped all along that by the
2 October meeting we will be able to report this Data Set
3 Number I, the profile of the individuals who have been
4 sentenced to death.

5 You will see under the project status
6 that much remains to be done in terms of even having
7 the complete data file. There are about 50 files that
8 are incomplete. There are about 20 that are being
9 reconstructed, and I might say painstakingly by the
10 Attorney General's staff. This is not for lack of
11 effort. This is an enormous undertaking and it is
12 going on daily. As soon as we have the complete data,
13 we can estimate. We are still hoping to make that
14 report in the October meeting.

15 If you look briefly at page 2, let me
16 just detail the second and third data issues that we
17 are most interested in. Data Set Number II is a Data
18 Set that the research committee suggested. It is also
19 a Data Set that I consider to be the most important
20 piece of information for this commission and citizens
21 to have. When you review only death penalty cases,
22 such as in Data Set I, you know a lot about the
23 process, you know something about victims, you know
24 more about defendants. But in order for us to talk
25 about the way in which the process really works, there

1 needs to be some comparisons. Who are those
2 individuals and what was the process followed in those
3 cases where an individual was charged with first-degree
4 murder and yet did not become death eligible and did
5 not march toward the death penalty.

6 This is the focus. It is a review of all
7 cases in which individuals were charged with
8 first-degree murder during a five-year period, the most
9 recent five years, January 1st, 1995 to December 31st
10 1999. The subcommittee chose four counties, the first
11 two because of the population density in the state:
12 Maricopa and Pima. Coconino and Mohave because we are
13 very very concerned as researchers and as our
14 colleagues on the committee that this is not a
15 commission about Maricopa and Pima County even though
16 their numbers may overwhelm the outlying counties, we
17 need very much to be aware of our colleagues throughout
18 the state.

19 The numbers that are estimated in
20 Maricopa in this five-year period, the estimate is 873
21 cases first-degree murder. Pima County, 348.
22 Coconino, 21; and Mohave, 19. I can promise you we
23 will have Mohave and Coconino analyzed in a very timely
24 manner. This is an amazing undertaking.

25 The idea, of course, would be to watch

1 this mass of cases where there has been a charge of
2 first-degree murder and then follow them through the
3 funnel that most people in this room are quite familiar
4 with, a criminal justice funnel, and to follow them
5 down that path. Within 30 days we have a major
6 juncture which of those are identified as cases for
7 whom the prosecutorial community consider very seriously
8 these should be people considered for the death penalty
9 and so our ideal is to follow the funnel and at every
10 juncture where people get thrown out or kept in, to
11 examine the forces that either propel them out of the
12 death penalty path or keep them in it. These data will
13 have the same information that Data Set I has. So it
14 is indeed a comparative study of individuals similarly
15 charged but whose progress through the system differs.

16 We are greatly appreciative to the
17 offices of the county attorneys for compiling the list.
18 I say this as if it took them a few seconds to do it.
19 This commission has been asking for information that
20 has not been codified and had not been systematized.
21 And so every time we turn to our colleagues and say we
22 really need this information, it has required hours and
23 weeks and months of people's time to gather that. I
24 say that just so we are aware of how much people have
25 already contributed in terms of the system analysis.

1 But here's the other part of it. At the end of this
2 process, these data systems will be in place and
3 Arizona will have one of the most up-to-date databases.
4 We won't have to go back to 1974 except for additional
5 information we are interested in. From now on it will
6 be, dare I say this, a relatively straightforward
7 process to keep track of murder one cases and those
8 that become death penalty cases.

9 We have identified the cases and data
10 gathering is beginning. I hope we will be presenting
11 the data to you within the life of this commission. It
12 will be unconscionable for me to say we will.

13 One thing we may do is take a random
14 sample, and as everyone remembers from your first
15 statistics class, random sample means that everything
16 has the same chance or likelihood of being in the
17 sample. And so therefore we would prefer to take at
18 least 100 from Pima, 200, 300 from Maricopa County.
19 Statistically that works in terms of doing this
20 statistical analysis. On the research team and with
21 our colleagues on the data research subcommittee, we
22 really would prefer to look at all of those cases, not
23 only because we really want to look at all of them, but
24 we feel particularly in the mind of the public whenever
25 you start talking about random samples, their

1 confidence level declines. And we know, and members of
2 this commission probably are well familiar with this
3 statistical logic of taking a small group and
4 referencing a larger group, generalizing.
5 Statistically it makes sense. Timewise it makes sense,
6 but in terms of ethics of the commission and the
7 persuasiveness of this commission in the eyes of the
8 public, we would prefer to do the universe, to do all
9 of them.

10 The third issue that we have been
11 pondering is what about the cost? This is an abyss, as
12 you know, if you in your capacity have tried to address
13 it in any conscientious way. We as a committee have
14 said that we will try to do two things simultaneously;
15 they are not unattainable, but they seem very
16 different. One is to never lose sight of how
17 encompassing this issue is, to not small picture the
18 cost of the death penalty. And that our desire, if we
19 had unlimited resources and time, would be to present a
20 picture, a portrait of the cost of the death penalty
21 that would be very in-depth and would be very
22 encompassing not only of physical matters but also in
23 the issue of human potential in terms of victims and
24 defendants. Having said that, we intend to persist to
25 remind us as a commission that that ought to be what we

1 would be striving for.

2 At the preliminary step we have suggested
3 that what we should do is begin to look at what one
4 portion, albeit a quite essential and important portion
5 of this, to look at the additional defense and
6 prosectorial cost associated with the death penalty
7 process. This is a tiny, tiny slice of this issue, but
8 we feel it may be one that will be able to address
9 adequately to provide information in the commission.

10 It has been an absolute joy to work with
11 the data and research committee. It is one of the
12 nicest arrangements I've ever enjoyed in terms of
13 working with the community. Our desire is this, that
14 the research won't be separated from the deliberations
15 and that research won't be something that is mystical
16 or distant. When we present the data to you we will
17 not be doing any fancy sleights of hand. We will give
18 you not only the patterns which of course interest us,
19 what are the patterns, but we will also make sure that
20 you understand for every pie chart you see, we will
21 tell you what are the numbers that went into making up
22 that pie chart, and give you those numbers. We are
23 also working long-term to make the database an ongoing
24 pursuit and to make it as widely available to you and
25 your organization and anyone of interest as much as

1 possible.

2 We have undertaken an amazing task. I'm
3 not sure that if when Janet and our Dean Ann Schneider
4 asked me about this, I don't know, I must have just had
5 a good night's sleep or something. We are dedicated to
6 trying to provide very very good information, reliable
7 information. Probably one of the parts of the -- one
8 of the aspects or dimensions of the research committee
9 that you will hear in your subcommittees is that
10 perhaps one of the biggest contributions we can make is
11 to encourage us not to rush to judgment without
12 adequate information. We are very respectful of your
13 experiences, of our collective experiences, of even
14 anecdotal information and tales that we like to tell
15 each other, but we would like to consistently remind
16 the commission, as well as citizens of Arizona, that
17 systematic conscientious data will make this process so
18 much more valuable than it would be otherwise.

19 MS. NAPOLITANO: Thank you, Dr. Bortner.
20 Judge Cole?

21 JUDGE COLE: Yes, under Data Set I, capital
22 cases review. You use the number 226 cases. I heard
23 earlier 239. Is that attributable to the July 1
24 cutoff?

25 DR. BORTNER: We haven't done anything to

1 those 13. It is the July 1st, 2000 cutoff, yes. And
2 again, that cutoff is a research methodology necessity
3 to say here's where we will stop looking at cases.

4 MR. TWIST: I thought I heard you say with
5 respect to Data Set Number 1 that we were only
6 profiling cases that result in reversals and --

7 DR. BORTNER: No, I'm sorry.

8 MR. TWIST: I was wondering if I heard that
9 right or if you could amplify on that.

10 DR. BORTNER: Let me explain. That relates to
11 that one piece of the process profile. For everything
12 else we are profiling everyone, everything or everyone.

13 MR. TWIST: The one piece.

14 DR. BORTNER: The one piece is when we get to
15 the appellate process I was saying that as researchers
16 we would very much like to compare all those cases that
17 are affirmed up on appeal. We would like to look at
18 the issues that did not succeed. Time prevents us from
19 doing that. So in looking at the appeal process, we
20 are focusing on the reversals. This is analogous to
21 most of the national research that's been done. So for
22 the defendant characteristics, the profile of the
23 victim, the issues of county, the issues of defense
24 attorney, the issues of mitigation and aggravation, all
25 of those are being viewed for everyone. But when we

1 get to the appeal process, many cases are passed along
2 without any reversal or remand. We are focusing on
3 those cases where there was reversible error. And it
4 makes logic -- it -- because many people on the
5 commission are saying -- might say if a case is
6 affirmed all the way along, what's the problem? Why
7 would we even bother looking at it? The system is
8 working well.

9 As researchers, we would like to compare
10 those cases to the cases that are -- an alarm goes off,
11 someone decides something must be reviewed or something
12 must be reversed. Those are the cases that receive the
13 most attention because they are ever held to be the
14 indicators of the problems of the system, by many
15 analysts and I think by many members of the commission.

16 Now, I don't mean that disrespectfully to
17 members of the commission who are very concerned about
18 cases that are affirmed all the way through and
19 respectfully we wish we could talk a lot more about
20 those. But most people, the alarms go off when there
21 is a reversal. So it's for that one piece of
22 information.

23 In terms of the time frame, everyone is
24 in there. In terms of looking at how long it takes
25 from sentencing to get to the direct appeal, the

1 Arizona Supreme Court decision on direct appeal, the
2 various points that Mr. McMurdy mentioned, all of
3 those, all of the 226 individuals are in all of those
4 data.

5 MR. TWIST: I guess I'm just somewhat
6 sceptical about what conclusions you will be able to
7 draw from only looking at the issues on appeal that
8 results in reversal. And I hope the conclusions will
9 be solid and I guess we will just wait to see.

10 DR. BORTNER: I would be very interested in
11 having a discussion about this issue. I am smiling
12 because the researchers on my staff have exactly the
13 same view. We have two law students and Ph.D people
14 saying we must look at all of these in terms of what
15 happens when it's affirmed. And that is a long-term
16 agenda issue. But your point is very well taken.

17 JUDGE FELDMAN: I trust that when you were
18 talking about reversals, I trust that you will make a
19 distinction between cases which reverse the conviction
20 and demand for a new trial and cases which confirm the
21 conviction but vacate the sentence and remand for
22 resentencing because they are two entirely different
23 subjects.

24 DR. BORTNER: Yes. Yes. Most people are
25 concerned primarily with those that reverse the

1 sentences, but, yes, the retrials are in there. And we
2 are making all those -- let me just tell you and I just
3 say this out of great fondness for the subcommittee --
4 one of the things that has been terrific about this
5 project is that we have literally come to people on the
6 subcommittee and said, "What about this?" For
7 instance, we don't want to make a distinction, we don't
8 want to group together issues that may be extremely
9 important to a member on the commission. Again, on the
10 mental health status, we have not grouped together the
11 many allegations of mental health -- related to mental
12 health status of the defendant. We have kept the ones
13 that are alleged coded separately from those that have
14 been diagnosed professionally because we think there's
15 a big distinction, and those that have been diagnosed
16 long term. And we came to the research committee and
17 said, "Does this make sense to you?" And they said,
18 "Don't mix them. Don't mix it because they are very
19 different on how that plays out in the system."

20 In terms of talking about the time intervals,
21 which time intervals are people most concerned with,
22 all of these we have received wonderful advice from the
23 subcommittee. We would be presenting the data results
24 to you committee members I think it would be January
25 3rd, 2006 if we were to do what the data committee

1 thinks we should do and I share your concern.

2 MR. KIMERER: Just a quick question, in
3 connection with Data Set I, you talked about
4 convictions of sentence affirmed by the Arizona Supreme
5 Court, does that take into consideration cases that go
6 into the federal system and then come back also?

7 DR. BORTNER: Yes. Yes, we are just saying
8 that's how you got in this sample was that it was
9 affirmed in order to decide on what are the people --
10 who are the individuals whose cases we will look at,
11 yes, that's how they get in. It looks at everything.

12 Now, most of the cases and more recent cases
13 are only so far as post-conviction relief petitions,
14 very few of them have made it all the way, but
15 long-standing cases -- thank you for your question too,
16 because it makes me think of something else we have
17 been mindful of. It would be a gross distortion of the
18 process and the major concerns here, if we group all of
19 the people sentenced to death in the last 25 years and
20 act as if it's all in the same time period because
21 there have been enormous changes. Even Mr. McMurdy's
22 brief introduction to us highlighted some major major
23 changes in the Arizona system. So data that we are
24 gathering is very sensitive to time changes. So for
25 instance, if a commission member says a really

1 important time period is 1988, we have the capacity,
2 given the time, to go in and find data that are
3 sensitive to a particular period of time. It's very
4 important not to act like the death penalty in 2000 is
5 not the same process as it was in 1974.

6 MR. WEISZ: I had one question. I share the
7 same concern of Steve. On another issue, the cost
8 assessment part, you are trying to determine the cost
9 currently basically of administering the death penalty.
10 There's one thing that we all need to keep in mind, if
11 there are going to be proposals that come out of the
12 commission, from the subcommittees to the commission
13 and make a recommendation that we keep in mind --
14 hopefully utilizing the service -- your services
15 continuously on what the costs are going to be for
16 those proposals, because anything we do if there are
17 proposals to change anything or improve anything, it is
18 going to effect state agencies and local agencies and
19 all those items; and if there's a way to also keep that
20 in mind as we go forth and utilize, maybe, your
21 services to know what those costs are, that will help a
22 lot of us.

23 DR. BORTNER: That's an amazingly important
24 point and it is a ton of work. And I thank you for
25 bringing that up. There are two ways this

1 commission -- there are a multitude, but there seem to
2 me to be at least two ways that the commission could
3 have proceeded; the Attorney General could have done,
4 as she has done, try to bring forward a cross section
5 of people in whom she has great trust in terms of your
6 deliberations on these issues. We could put in the
7 center a pile of our recommendations, policy
8 recommendations that we bring with us at this very
9 moment based on our experiences and our values and our
10 research, et cetera, put them in the center and spend
11 the next three months debating those. That could have
12 been one way. We are still doing that anyway, even
13 though we are not saying that. But on the other hand,
14 we could also say what systematic, reliable,
15 conscientious evidence can we bring to bear on these
16 important issues and that's what the data research
17 committee has been about and we welcome that charge,
18 but it is an enormous challenge as well.

19 MR. STOOKEY: I just wanted to make sure that
20 we are clear on the 226 number with regard to Data Set
21 Number 1. That is, if I'm correct, that's all of the
22 cases during that time period in which this death
23 penalty was ordered by the trial court; is that
24 correct?

25 DR. BORTNER: Yes. Yes. In other words,

1 everyone who was sentenced to death by a trial court is
2 in here.

3 MR. BABBITT: Dr. Bortner, as the Data Set II,
4 I just wanted to make sure that it was on everyone's --
5 that this commission was aware that this Data Set
6 includes a lot of cases that are still active in the
7 system. Many of them are still pending trial. Many of
8 them are still pending sentencing. And we have raised
9 the issue that it may cause some serious legal and
10 ethical issues for prosecutors to be commenting on
11 cases that are still active. So to the extent that the
12 information in those cases is not in the public record
13 somewhere, that information may be more limited.

14 DR. BORTNER: And, again, we will code much of
15 the data for recent cases in this sample of the last
16 five years within the last six months. It will go so
17 far and then it will say, "disposition not determined."

18 And, again, we suspect that people on the
19 commission will speak in great volumes to the data, but
20 on the other hand, there will be occasions where one
21 wishes to speak but doesn't know how to address it, but
22 then also feels for certain reasons that you must
23 remain silent.

24 MR. BABBITT: Also, if I could just comment on
25 one other thing, you said that some of the information

1 you were gathering relative to the victims was somewhat
2 shadowy, I think that was the term you used and to the
3 extent that you could use other sources of information,
4 I would suggest perhaps the Parents of Murdered
5 Children, it's a national organization, they have
6 several chapters, I believe in Arizona, because I don't
7 believe that you are going to find a lot of victim
8 information in the presentence reports that are
9 submitted to the trial judge.

10 DR. BORTNER: Thank you. And thank you very
11 much because that's a wonderful example. Please feel
12 free to speak with any member of the research data
13 committee and give us such valuable advice and
14 information. If you represent a constituency or even
15 represent yourself and you have information and data
16 that you would like to make available to us, one of the
17 things we would like to do in the long-term is at least
18 by the end of this three-month portion of our
19 deliberations to have a good list of alternative data
20 sources that we may or may not have been able to tap.
21 There are some researchers in the Arizona community, a
22 few at the University of Arizona, more at Arizona State
23 right now, in terms of looking at this issue we want to
24 make sure that the commission and the public has access
25 to as much information as possible.

1 And again we have expressed our
2 appreciation to the victim witness offices of the
3 county attorney and the Attorney General's Office.
4 They have come forward and very graciously offered not
5 only to tell us they have data but to help us gather
6 it.

7 MR. CARDENAS: John Stookey's clarification
8 raised a question for me. If it's every case in which
9 the trial court imposed the death sentence, what is
10 with convictions and sentences affirmed by the Arizona
11 Supreme Court? I mean, is that a qualifier in any way
12 then? In other words --

13 MS. NAPOLITANO: It's not a qualifier, Jose.
14 It is -- 226 is the universal cases.

15 MR. STOOKEY: The way it's phrased I think is
16 unclear, that's why I tried to clarify it, but it is
17 all of the cases where the death penalty was given by
18 the trial judge.

19 JUSTICE FELDMAN: The figure 850 first-degree
20 murder cases does not really tell you anything. You
21 need to take and determine the number of first-degree
22 murder convictions in which the State had asked for the
23 death penalty and the trial judge did not impose the
24 death penalty but instead imposed a life sentence
25 because if prosecution does not ask for the death

1 penalty, the trial judge never gets to the point of
2 determining whether there were aggravating
3 circumstances and what the mitigating circumstances
4 were. So the 850 figure of first-degree murder
5 convictions by itself means absolutely nothing as far
6 as your inquiry is concerned. Our inquiry I guess is
7 concerned more with those cases in which the death
8 penalty was requested by the State and then not imposed
9 by the trial judge.

10 DR. BORTNER: They're in there. They are all
11 in there and that will be one of the junctures where
12 they remain and so, yes, they will be profiled.
13 Whenever there's a consequential decision made about
14 the death penalty and whether or not a case should be
15 considered for the death penalty and when actual legal
16 processes proceed, that is a crucial juncture and those
17 people who remain in the death group, death penalty
18 group and those who do not will be distinguished. In
19 other words, the 800 at the beginning of Maricopa
20 County, we will look at them and then immediately most
21 of them will fall out because there's no request for
22 the death penalty.

23 Now, many people will say what's the
24 difference for those whom there is the request and
25 those who are not we will have that information. Yes,

1 it narrows very quickly. Very quickly.

2 MR. BUSH: On Set II these individuals were
3 charged with first-degree murder, does that include
4 convictions?

5 DR. BORTNER: No, that will be one of the
6 junctures. In other words, to get in your sample it
7 will be charged. If you are not convicted, you are
8 out.

9 MR. BUSH: Well --

10 DR. BORTNER: It's a methodological notion
11 that you should start your inquiry as broadly as
12 possible so that you haven't ignored a decision-making
13 point, that if you ignore that decision-making point
14 you have flavored the character of everyone you are
15 talking about and everyone you're studying. So the
16 individuals of whom you speak, they are really not of
17 concern to this commission, although some people would
18 like to know a lot of things about people who have been
19 charged with first-degree murder, but not -- don't get
20 convicted. Some of that we will have, but they are not
21 the focus of our concern because they fall out very
22 quickly.

23 MR. BUSH: So you mean one of the focuses of
24 our concern, standpoint of fairness, two people are
25 convicted, both the prosecutor asks for the death

1 penalty, one gets it, one does not. That's the
2 comparison, seems to me, that is the crucial one, not
3 whether they were not convicted of the charge as
4 Feldman said, but in Set II apparently we are only
5 going to make the comparison then with 13 cases,
6 correct?

7 DR. BORTNER: That's all there were.

8 MR. BUSH: So as you say, when you become
9 eligible to get the death penalty may be determined to
10 some degree whether it was in 1980 or 1990, so it's a
11 pretty limited comparison that we are going to do in
12 Set II when we think of the 226 cases that have gone
13 before and I realize that you can't probably
14 statistically do it for the 226 but --

15 DR. BORTNER: I'm sorry. I should have said
16 this from the very beginning, those 226 people who
17 received the death penalty, they are in Data Set Number
18 2, because -- I'm so sorry. Forgive me. It's a bit of
19 a lack of sleep. I should have said that at the very
20 beginning. Everyone who is charged with first-degree
21 murder is in Data Set II. That's why we think it is so
22 valuable because the people who received the death
23 penalty, they are in there. Yes, they are in there.

24 MS. NAPOLITANO: By definition they have been
25 charged with first-degree murder and then you look at

1 the larger universe at who's been charged with
2 first-degree murder for whom there was not the death
3 penalty sought or imposed.

4 DR. BORTNER: Thank you very much for the
5 question, because that's the crucial distinction. What
6 Data Set II does is it takes the information from Data
7 Set 1 about individuals who received the death penalty
8 and it adds to them similarly situated individuals in
9 terms of first-degree murder. It's probably the most
10 valuable piece of information because we are looking at
11 comparisons.

12 MS. NAPOLITANO: Let's have one more last
13 question for Dr. Bortner. If you have suggestions on
14 Data Set II and III in terms of things you want to make
15 sure that the data subcommittee is evaluating, they are
16 just starting on Data Set II work and haven't begun on
17 Data Set III, so we have time to pick up those
18 suggestions and have them considered by the
19 subcommittee.

20 Data Set I, as Dr. Bortner mentioned, is well
21 on its way. That's what I would call -- that goes to a
22 lot of issues that are the initial inquiry into the
23 death penalty across the country, race, bias, and that
24 sort of thing and that we should have available by next
25 month. And then as Dr. Bortner has alluded, as we

1 collect this data one of the benefits of this
2 commission already is we are putting into place
3 mechanisms so we can track these cases. They haven't
4 previously been tracked. So just the data collection
5 portion of this, I think, is going to be of service in
6 the long run in Arizona.

7 Does anybody have one last question for
8 Dr. Bortner?

9 DR. BORTNER: Thanks very much.

10 MS. NAPOLITANO: There's going to be an exam
11 on statistical methods at the end of this. One of the
12 questions you all may have as we move into
13 subcommittees and organization is do we need to stop
14 what we are doing until all the data is collected and
15 massaged before the subcommittees can begin to work,
16 and the answer to that, I believe, is no. A lot of the
17 issues that have already been posed to the
18 subcommittees are not truly data specific. For
19 example, in issues, possible issues for evaluation by
20 the pre-trial committee, subcommittee, one of the
21 issues is how does the Arizona statutory scheme for
22 determining death eligibility in first-degree murder
23 cases compare with that of other states that have the
24 death penalty? How do other states handle the issue of
25 the eligibility of the mentally retarded to be

1 executed? What is the experiences in other states and
2 do other states have a mitigator of, quote, residual
3 doubt and so forth? So I would ask the subcommittees
4 to identify the issues that are not really data
5 specific and begin talking and deliberating on those
6 and then we will pull the data in as it becomes
7 available.

8 Let me move on, if I might, to the
9 subcommittees. You all should know which subcommittee
10 you are in. Does anybody know? Should I read off the
11 list? Okay. I think it's been handed out, but
12 Pre-Trial Issues will be chaired by Tom LeClaire. It
13 will include Paul Ahler, Jim Bush, Jose Cardenas,
14 Harold Higgins, Judge Jorgenson, Representative Loreda,
15 Pat Orozco, Lee Stein and George Weisz.

16 The Trial Subcommittee will be chaired by
17 Judge Cole, and it will have on it Judge Conn, Jaime
18 Gutierrez, Chip Hastings, Representative Jarrett, Chris
19 Johns, Mike Kimerer, Gail Leland, John Stookey and Rick
20 Unklesbay.

21 And the Subcommittee on Appeal and PCR
22 will be chaired by Judge Ryan. It will have Paul
23 Babbitt, Dr. Bortner, Senator Cummiskey, Justice
24 Feldman, Nancy Jones, Chuck Krull, Justice Moeller,
25 Senator Smith and Steve Twist.

1 What I would like to do now is see if
2 there are any closing comments members of the
3 commission would like to make. And then my suggestion
4 is -- let me introduce a couple people first, and then
5 my suggestion is going to be that we break for the day.
6 Your subcommittee chairs will get in touch with you
7 about scheduling a meeting. Our office will be
8 available to provide staff and research assistance to
9 commission members and in particular to subcommittee
10 chairs because we understand that there may be
11 questions or issues or things that you want considered
12 and you want to look at X, Y, and so forth.

13 Let me if, I might pause briefly to
14 introduce some people from the Attorney General's
15 Office that you are going to be running into during the
16 process, first is Pat Cunningham. Pat is kind of our
17 internal staff director for the commission and is doing
18 a lot of the prep work. Dennis Burke is our chief
19 deputy for policy and planning and particularly useful
20 in what's going on around the county. Diane Saunders,
21 is Diane here? Diane stepped out, but she's the person
22 who's preparing all the mailings and getting them to
23 you and faxing you things and so forth and so on. So
24 those are three individuals who you are likely to run
25 into.

1 Let me also make a comment, if I might,
2 before we break about the openness of the meetings and
3 the deliberations and so forth. This commission does
4 not technically fall under the purview of the open
5 meeting laws that are currently in place in Arizona,
6 but in the Attorney General's Office we're big
7 believers in access to government. So we are trying to
8 conduct this in the spirit of the open meeting law.
9 That's why guests are invited and the press knows, will
10 know about our commission meetings. All the documents
11 and so forth that are collected or exchanged during
12 these deliberations, both at the subcommittee and
13 committee level, we will be maintaining in a central
14 file which will be open to any member of the public who
15 wishes to see it. And for members of the press who
16 want to get things, the standard is ask the public
17 information officer. We'll make materials available.
18 And we will make our deliberations available as well.

19 We are having a court reporter transcribe
20 everything so that when we get to the end of this, be
21 it in January or whatever, we will have accurate
22 recollection of what was said at these meetings and in
23 appropriate context so none of that gets lost in the
24 shuffle. I think it's important for this commission to
25 make a historical record as well as a data record of

1 what's going on. So that's the purpose of having the
2 court reporter.

3 Before -- why don't we see if there are
4 any last comments and then break.

5 MR. TWIST: Just a quick comment, Janet. I'm
6 sure I speak for everybody here when I compliment you
7 and the office on the organization for the materials,
8 overviews. They were put together extremely well, very
9 helpful. I think it's gotten off to a really good
10 start, the focus on the issues that you have presented,
11 so thank you.

12 MS. NAPOLITANO: Any other comments? I will
13 take any praise. If you have any criticism, Pat's in
14 the back of the room.

15 Any other comments? All right. With
16 that, I'm going to adjourn the first meeting of the
17 commission. Your subcommittee chairs will be in touch
18 with you. Any comments, suggestions, input, we will be
19 glad to take it. Thank you all very much.


20 (Whereupon, the proceedings concluded at
21 11:28 a.m.)
22
23
24
25

1 STATE OF ARIZONA)
2) ss.
3 COUNTY OF MARICOPA)

4 BE IT KNOWN that the foregoing proceeding
5 was taken before me, LORETTA A. STANFIELD, a Certified
6 Court Reporter in and for the County of Maricopa, State
7 of Arizona; that the foregoing 55 pages are a true and
8 correct transcript of all proceedings had upon the
9 taking of said proceeding, all done to the best of my
10 skill and ability.

11 I FURTHER CERTIFY that I am in no way
12 related to any of the parties hereto nor am I in any
13 way interested in the outcome hereof.

14 DATED at Phoenix, Arizona, this 31st day
15 of October, 2000.

16 
17 LORETTA A. STANFIELD
18 Certified Court Reporter
19 Certificate #50513
20
21
22
23
24
25